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No. 87-1676

In the Supreme Court of the United States

OCTOBER TERM, 1987

HARRY I. SAUL, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF HELEN M. SAUL, AND JULIAN D. SAUL, CO-EXECUTOR OF THE ESTATE OF HELEN M. SAUL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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8 pp

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Petitioners contend that the courts below erred in denying their request for litigation costs and attorney's fees under Section 7430 of the Internal Revenue Code.[1]

1. On December 2, 1977, Harry I. Saul and Helen M. Saul (the taxpayers) purchased 20 gemstones for $14,616 (DX 2). The next day the taxpayers lent the gemstones to the Smithsonian Institution's National Museum of Natural History (Tr. 15). On December 31, 1978, after the holding period specified by Section 170(e) had expired,[2] the tax-

[1] Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended (the Code).

[2] Section 170(e)(1)(A) of the Code provides that the amount of a charitable contribution deduction resulting from the donation of appreciated "capital gain property" is reduced by the amount of gain that would not have been long-term capital gain if the property contributed had been sold at its fair market value. The effect of this provision is to limit the taxpayer's deduction to the amount of his basis, *i.e.*, his cost, unless gain on the sale of the property at the time of the donation

payers donated the gemstones to the Smithsonian (Tr. 22). The taxpayers subsequently claimed on their joint income tax return a charitable deduction in the amount of $75,623 for this donation. The Commissioner of Internal Revenue thereafter issued a notice of deficiency in which he disallowed the claimed deduction on two alternative grounds: (1) that the taxpayers had failed to establish that the fair market value of the gemstones was $75,623, and (2) that the taxpayers lacked donative intent.

The taxpayers paid the deficiency and brought this refund suit in the United States District Court for the Northern District of Georgia. During the course of pre-trial preparation, the government abandoned the second objection made by the Commissioner in the notice of deficiency, *i.e.*, that the taxpayers lacked the requisite donative intent. Thus, the stipulated pretrial order submitted by the parties stated that the only issue presented was whether the gemstones had a fair market value of $75,623 when they were donated (see Tr. 23). The issue was tried to a jury, which returned a special verdict finding that the fair market value of the gemstones as of the date they were donated was the amount claimed by the taxpayers (Tr. 318).

Petitioners then moved for an award of litigation costs and fees. The district court denied the motion (Pet. App. 1A-4A). The court concluded that the government's contention that the gemstones had a value substantially less than that claimed by the taxpayers presented a fair issue for determination by the jury and therefore that the position was not "unreasonable" under Section 7430 (Pet. App. 2A).

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would qualify for long-term capital gain treatment. Because the holding period to qualify for long-term capital gain treatment in 1978 was one year (see 26 U.S.C. (Supp. I 1977) 1222), petitioners were required to hold the property for at least that long in order to take a deduction for any claimed appreciation.

The court of appeals summarily affirmed in a one-line order (*id.* at 5A-6A).

2. Petitioners contend (Pet. 7-15) that the court of appeals erred in affirming the district court's denial of the request for attorney's fees. Petitioners maintain that the source of the courts' error is their failure to look at the reasonableness of the government's administrative position, instead focusing only on the reasonableness of the government's litigating position. Petitioners urge that the Court should grant certiorari to resolve a conflict in the circuits on this dispute over the proper interpretation of Section 7430. This contention is without merit for two reasons. First, the conflict asserted by petitioners has been resolved by Congress for cases commenced after December 31, 1985, and thus the question presented in the petition is of little continuing importance. Second, on these facts, petitioners would not be entitled to attorney's fees under either interpretation because the government's administrative position was not unreasonable. Accordingly, there is no reason for review by this Court.

a. Petitioners are correct in stating that there exists a conflict in the circuits in interpreting Section 7430(c)(2)(A)(i) of the Code, as applicable to cases commencing before December 31, 1985. That subsection provides that attorney's fees may be recovered under Section 7430 only by a party who "establishes that the position of the United States in the civil proceeding was unreasonable." Three circuits have held that the "position of the United States in the civil proceeding" includes the IRS's administrative position. *Sliwa* v. *Commissioner,* 839 F.2d 602, 607 (9th Cir. 1988); *Powell* v. *Commissioner,* 791 F.2d 385, 391-392 (5th Cir. 1986); *Kaufman* v. *Egger,* 758 F.2d 1, 4 (1st Cir. 1985). Four other circuits have held, however, that the "position" whose reasonableness is to be analyzed is only the government's litigating position in court. *Wickert* v. *Commissioner,* 842

F.2d 1005, 1008 (8th Cir. 1988); *Ewing & Thomas, P.A.* v. *Heye*, 803 F.2d 613, 615-616 (11th Cir. 1986); *Baker* v. *Commissioner*, 787 F.2d 637, 641-642 (D.C. Cir. 1986); *United States* v. *Balanced Financial Mgmt., Inc.*, 769 F.2d 1440, 1450 (10th Cir. 1985).[3]

This conflict was definitively resolved by Congress in the Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085. Section 1551(e) of that legislation amended Section 7430 of the Code to provide an express definition of the phrase "position of the United States." See 100 Stat. 2753. Section 7430(c)(4), which was made applicable to cases commenced after December 31, 1985 (see § 1551(h), 100 Stat. 2753), now provides:

> **Position of United States**—The term "position of the United States" includes—
>
> (A) the position taken by the United States in the civil proceeding, and
>
> (B) any administrative action or inaction by the District Counsel of the Internal Revenue Service (and all subsequent administrative action or inaction) upon which such proceeding is based.

Thus, the question presented in this case is relevant only to a dwindling number of cases commenced prior to 1986,[4] and there is no reason for this Court to resolve it.

b. In any event, application of the interpretation sought by petitioners would not assist their cause because the administrative position of the IRS in this case was reasonable.

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[3] Petitioners err in stating (Pet. 10) that the Eleventh Circuit's rule is that only the proceedings "in the courtroom and before the judge" are to be examined for reasonableness. The rule requiring examination of the litigating position of the United States encompasses all proceedings after the petition or complaint is filed. See *Ewing & Thomas, P.A.* v. *Heye*, 803 F.2d at 614.

[4] The instant case was commenced on November 6, 1985.

Petitioners do not appear to dispute the conclusion of the district court that the Commissioner acted reasonably in maintaining his principal challenge to the claimed deduction, namely, that the fair market value of the donated gemstones was less than $75,623. The Commissioner's objection on that point was plainly reasonable inasmuch as petitioners had paid only $14,616 for the gemstones less than 13 months before they were donated. That objection, in itself, was a sufficient basis for denying the claimed deduction. Moreover, the alternative position advanced by the Commissioner in the notice of deficiency, viz., that petitioners lacked the requisite donative intent, was not unreasonable. The particular circumstances of this case, where the taxpayers "lent" the gemstones to the Smithsonian on the day after they were purchased and then made a "gift" of the stones 12 months later, when the full tax benefits of a donation could first be realized (see note 2, *supra*), gave ample reason to question the true motive underlying the transaction.[5]

Petitioners also erroneously suggest (Pet. 8-9, 14) that the Commissioner acted unreasonably in failing to obtain an expert opinion concerning the value of the gemstones until shortly before the trial. Petitioners acknowledge (Pet. 3) that the Commissioner did value the gems during the course of the administrative proceedings. Moreover, he was entitled to consider the taxpayers' purchase price as probative evidence of the value of the stones when they were donated. See, *e.g.*, *Anselmo* v. *Commissioner*, 757 F.2d 1208, 1213

[5] The Commissioner was well aware that, at the time this deduction was claimed, promoters of tax shelters were marketing gemstones and similar items to taxpayers with the promise that they could donate the stones to museums at exaggerated values and take charitable contribution deductions that would yield tax savings well in excess of the purchase price of the stones. See, *e.g.*, *Anselmo* v. *Commissioner*, 80 T.C. 872, 873-875 & n.3 (1983), aff'd, 757 F.2d 1208 (11th Cir. 1985); Tr. 107-108, 113-118; DX 4.

(11th Cir. 1985); *Estate of Kaplin* v. *Commissioner*, 748 F.2d 1109, 1111 (6th Cir. 1984). Because a taxpayer bears the burden of establishing his entitlement to a deduction, it was the taxpayers' burden to establish the fair market value of the gemstones when they were donated. See, *e.g.*, *Orth* v. *Commissioner*, 813 F.2d 837, 841 n.5 (7th Cir. 1987); *Anselmo* v. *Commissioner*, 757 F.2d at 1211 & n.2. Accordingly, it was quite reasonable for the government to wait until it was apparent that the case was going to go to trial before undertaking to obtain its own expert appraisal.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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